VARIOUS PHASES OF LABOR LEGISLATION WITH REGARD TO CONSTITUTIONALITY

BY

O. JOHN ROGGE

THESIS

FOR THE

DEGREE OF BACHELOR OF ARTS

IN

POLITICAL SCIENCE

COLLEGE OF LIBERAL ARTS AND SCIENCES

UNIVERSITY OF ILLINOIS

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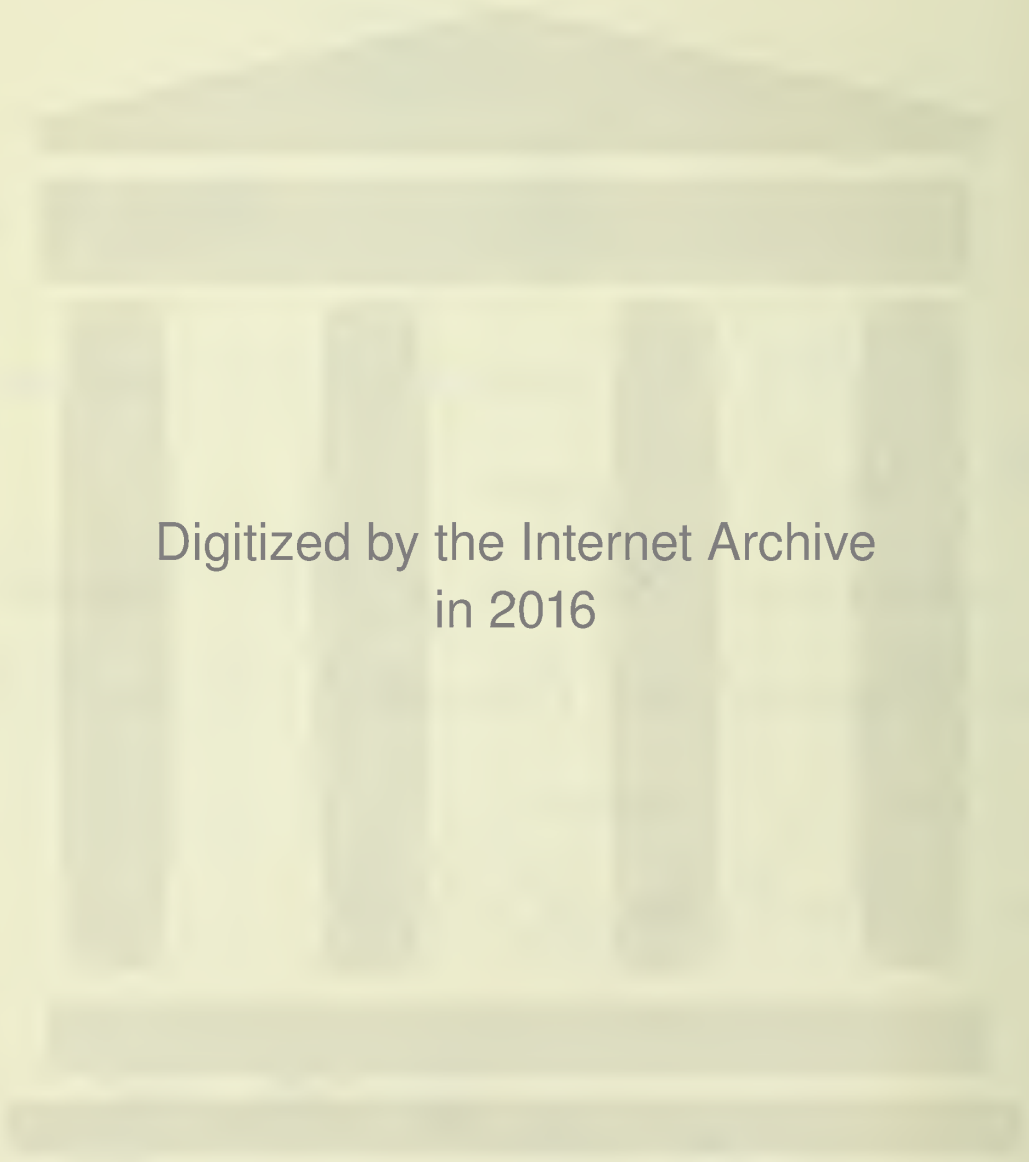

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VARIOUS PHASES OF LABOR LEGISLATION WITH REGARD TO CONSTITUTIONALITY

It is the purpose of this paper to examine into the state governmental action taken in regard to labor with the resulting court decisions, and, in conclusion, note whether there are any principles underlying the action taken and whether there is any trend of opinion which regards labor in a different light than it has been considered. I shall first discuss labor and the labor contract, and then take up the various phases of state governmental action.

We have expanded from a nation having a surplus of reserve land to a nation in which all the arable land is taken up; from a country comprised of mostly independent farmers to a country in which single establishments have thousands and ten thousands of workers, and one, the United States Steel Corporation, over 200,000. These factors have combined to produce a large class permanently dependent on wages.

Along with this we have the labor contract which, externally at least, appears as any other contract, but which in the course of time has come to be looked upon as something peculiar, due partly to the fact that when a laborer agrees to work he must deliver himself up for a time into the control of another. After having contracted, however, he cannot be forced to perform, for this would be involuntary servitude and contrary to the thirteenth

amendment. This principle is upheld in Bailey v. Alabama. The court said: "The act of Congress nullifying all state laws by which it should be attempted to enforce the service or labor of any persons or peons, in liquidation of any debt or obligation or otherwise, necessarily embraces all legislation which seeks to compel the service or labor by making it a crime to refuse to or fail to perform it." * Seamen, however, are excepted, as was decided in the case of Robertson v. Baldwin, the court saying, "We know of no better answer to make than to say that services which have from time immemorial been treated as exceptional shall not be regarded as within its purview." **

On the other hand, many progressive laws have been overthrown because it is alleged that they impair the freedom of contract, and thus violate the clause in the fourteenth amendment which declares that a person shall not be deprived of "life, liberty or property without due process of law." In the case of Lockner v. New York, a New York statute forbidding any employee in a bakery or confectionery establishment to be permitted to work over 60 hours in any one week, or an average of over 10 hours a day for the number of days employees should work, was delcared

* Bailey v. Alabama (1911) 219 U.S. 219, 31 Sup. Ct. 145.

** Robertson v. Baldwin (1897) 165 U.S. 275, 17 Sup. Ct. 326.

invalid because it abridged the freedom of contract. The court said: "The statute necessarily interferes with the right of contract between the employer and the employees concerning the number of hours in which the latter may labor. The general right to make a contract in relation to his business is part of the liberty of the individual protected by the fourteenth amendment of the constitution. ... Statutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual, and they are not saved from condemnation by the claim that they are passed in the exercise of the police power and upon the subject of the health of the individual whose rights are interfered with, unless there be some fair ground, reasonable in and of itself, to say that there is material danger to the public health,or to the health of the employees, if the hours of labor are not curtailed." *

Such was the early stand of the court, but it has been practically overruled by the later case of Bunting v. Oregon. An Oregon statute prividing that "no person shall be employed in mill, factory, or manufacturing establishment in this state more than ten hours in any one day, except watchmen and employees when

* Lochner v. New York (1905) 198 U.S. 45, 25 Sup. Ct. 539.

engaged in making necessary repairs, or in case of emergency, where life or property is in imminent danger; provided, however, employees may work overtime not to exceed three hours in any one day, conditioned that payment be made for such overtime at the rate of time and one half of the regular wage" was upheld as a valid exercise of the police power because the state protected the physical well-being of its citizens. "It is enough for our decision if the legislation under review was passed in the exercise of an admitted power of government (police power); and that it is not as complete as it might be, not as rigid in its prohibitions as it might be, gives, perhaps, evasion too much play, is lighter in its penalties than it might be, is no impeachment of its legality." *

A somewhat different viewpoint was stressed in the case of Holden v. Hardy. The court said: "The Legislature has also recognized the fact, which the experience of legislators in many states has corroborated, that the proprietors of these establishments and their operatives do not stand upon an equality, and that their interests are, to a certain extent, conflicting." **

These unusual relations between a "propertyless seller

* Bunting v. Oregon (1917) 243 U.S. 426, 37 Sup. Ct. 435.

** Holden v. Hardy 169 U.S. 366.

of himself, on the one hand, and a propertied buyer on the other, coupled as it is with the equal suffrage of both in the politics of the country, has gradually acquired recognition as something sufficiently important for the government to take notice of." * The tremendous changes in political and social conditions due to the adoption of improved means of transportation and to the establishment of the factory system have brought with them problems whose solution seems to be impossible under the principles of law which were regarded as both axiomatic and permanently enduring at the end of the eighteenth century." ** Now what were some of the common law doctrines with regard to the relations between employee and employer?

On the one hand, the employer was required to use due care for the safety of his employees while engaged in his service, and this was taken to "include all reasonable means and precautions, the facts in each particular case being taken into consideration."*** On the other hand, we had the doctrines of assumed risk, contributory negligence, and fellow-servant. In the first place we had the principle of"Volenti non fit injuria" which is translated

* Commons and Andrews, Principles of Labor Legislation, 1920, p. 2.

** Goodnow, Social Reform and the Constitution, p. 1.

*** Clark, The Law of the Employment of Labor, p. 125.

freely to mean, "That to which a person assents is not esteemed in law an injury." In other words, the employee assumed the ordinary risks incident to the employment, "and of such other risks as may be known and appreciated by him." * Besides this, in order for an employee to win his case, he must establish his own freedom from negligence, he must show that he has not contributed to the negligence of his employer. In the last instance, the fellow-servant rule relieved "the master from all liability for an injury sustained on account of the negligence or carelessness of a fellow-servant provided the master had exercised reasonable care in his selection," ** which may be easily proven. Through these three loopholes many employers were able to escape, and only a small number of employees received compensation for the injuries sustained. Moreover, many cases did not even reach the courts because the employee knew that all the odds were against him. The problemceased to be an individual one, and became a social evil.

At first we had legislative regulation; but this was inadequate due to the incompleteness of these laws, to their defective enforcement in many cases, and to the absence of well-de-

* Ibid. p. 141.

** Commons and Andrews, Principles of Labor Legislation, p. 390.

fined standards. Attempts were made to place more liability upon the employer, but the machinery was still too slow and expensive. "Of every $100. paid by the employer in premiums, but $28. reached the workman, and that amount only after a long legal action in many instances." * The next step was Workmen's Compensation.

"The theory of Workmen's Compensation is that industry should bear the loss of life and limb incurred in the production of its finished product, just as it bears the expense of replacing wornout and broken machinery; and that for every injury incurred in the course of employment some fixed amount should be provided in the way of compensation to the person incurring the injury, or to his dependents in case of his death; and this without regard to the question of fault or negligence of the employer, because many injuries or deaths are bound to occur under modern conditions even when the utmost care is exercised by both the employer and the employee." ** The practical application of this doctrine involves a virtual abandonment of the common law principles and many statutory enactments known as "employers' liability acts." In other words, an award of a fixed sum is provided for injuries for which the employment is responsible instead of a suit for damages and the question of fault.

* Ibid. p. 392. Records taken from 10 insurance companies for a period of three years.

** Bulletin of the Industrial Commission of Ohio. Jan. 1, 1915, p. 3.

Or, as the investigating commission of the American Federation of Labor and the National Civic Federation has put it: "The principle of workmen's compensation is that industry should bear the financial burden of all industrial accidents rather than the workers who happen to be the victims of particular accidents, and that the only way this can be accomplished is through the agency of the employer who, in computing costs and fixing the price of his finished product will include the industrial losses due to accidents. Industrial operations being broadly considered, the question of direct fault is not material. The fact that loss of bodily faculty and regular wages occurs entitles the victim to compensation unless his injuries have been received through his own wilful intent." * In this last respect workmens compensation differs from employers' liability, for under the latter the employer paid damages only where the accident was due to his fault or the fault of his employees.

Such a wide departure from established practices would, under our legal system, naturally involve the question of constitutionality, and the laws were attacked under the various grounds of due process, unfair classification, freedom of contract, and

* Workmen's Compensation Report, Senate Document 419 63rd Congress, 2nd session.

equal protection of the law. The first act was passed by the State of Maryland in 1902 in the form of a cooperative insurance law. This statute was restricted in its application to quarrying, mining, steam and street railway service, and to municipalities engaged in the construction of sewers or other excavations or physical structures. Liability was extended where employees were injured through the negligence of a fellow-servant, and where the injured negligently contributed to his own injury; but the act further provided that an employer might be exempted if he made certain annual payments in monthly installments for the maintenance of an insurance fund. This statute was declared unconstitutional in 1904 by the Court of Common Pleas of Baltimore on the ground that it deprived parties of the right of trial by jury and conferred upon an executive officer at least quasi-judicial functions. Judge Stockbridge delivered the opinion as follows: "The effect of the act was, therefore, not only to vest in the insurance commissioner powers and functions essentially judicial in their character, but to take away from the citizens the legal right which they had heretofore enjoyed, and which would be enforced by them in the courts, and also to deny to them the right to have their cases heard before a jury." * The case was not appealed to the supreme court.

* United States Bureau of Labor. Bulletin 57, p. 690.

The next act which was questioned and declared unconstitutional was a New York Compulsory Workmen's Compensation statute for certain dangerous employments such as work in the construction of tunnels and subways, things charged with electric currents, work on scaffolds over twenty feet high, work carried on under compressed air, etc. The case was Ives v. South Buffalo Railway Company, decided in March, 1911. The court did not doubt the power of the legislature to regulate, modify or abolish the fellow-servant and the contributory negligence doctrines, but declared it invalid as in conflict with this provision of their state constitution: "The trial by jury in all cases in which it has been heretofore used shall remain inviolate forever." The court said: "In other words, the objection which we are now considering bears solely upon the question whether the two last mentioned sections of the statute (dispensing with suit for damages at common law) deprive the employer of the right to have a jury fix the amount which he shall pay when his liability to pay has been decided against him. ... The argument that the risk to an employee should be borne by the employer because it is inherent in the employment may be economically sound, but it is at war with the legal principle that no employer can be compelled to assume a risk which is inseparable from the work of the employee, and which may exist in spite of a degree of care by the employer far greater than may be exacted by the most drastic law. ... We conclude, therefore, that in its basic and vital features the right given

to the employees by this statute, does not preserve to the employer the 'due process' of law guaranteed by the Constitutions, for it authorizes the taking of the employer's property without his consent and without his fault." *

The next statute which was questioned was a compulsory Workmen's Compensation act of Montana. The act provided: "Section 1. : All workmen, laborers, and employees employed in and around any coal mines, or in and around any coal washers in which coal is treated, except office employees, superintendents, and general managers, shall be insured in accordance with the provisions of this act, against accidents occuring in the course of their occupations. Section 2. All corporations, ... engaged in the business of operating any coal mine or coal washers in the state of Montana shall pay to the auditor of the state, within five days after the monthly wages at the particular mine shall have been paid, one per cent per ton on the tonnage of coal mined and shipped, or sold locally, or having been mined is ready for sale during the month for which the wages were paid; and all persons mentioned in section one employed in and about coal mines shall allow to be deducted from their gross monthly earnings one per cent thereof ... ." ** Injured workmen, however, were also per-

* Ives v. South Buffalo Ry. Co. 201 N.Y. 271. (1911)

** Montana laws of 1909. Chap. 67.

mitted to sue under the employers' liability law; but in so doing forfeited the benefits under the compensation act. This law was declared unconstitutional in the case of Cunningham v. Northwestern Improvement Co. The court, after holding the act as within the police power, not an example of class legislation, not violating the trial by jury provision ("The right of trial by jury, which is secured and protected by the constitution, refers to the trial of cases, actions, or suits at law, and has no reference to claims against an indemnity fund, such as are provided for by this act" *), that it was due process of law, rested its decision on the contention that the employer was deprived of the equal protection of the laws because the employee was given the option of suing to recover damages. The opinion on this point is as follows: "The injured employees of one operator may all resort to the indemnity fund, while those of another may elect to appeal to the courts. The result is that the employer against whom an action is successfully prosecuted is compelled to pay twice. He has fully paid his assessments under the act, and is also obliged to pay damages." **

* Cunningham v. Northwestern Improvement Co. 44 Mont. 180.

** Ibid.

In 1911 ten laws were enacted in the states of California, Illinois, Kansas, Massachusetts, Nevada, New Hampshire, New Jersey, Ohio, Washington, and Wisconsin. The laws in all but two of these states, Kansas and Nevada, were questioned, and in every case their constitutionality was upheld.

One elective act which was upheld, was an Illinois statute questioned in the case of Deibeikis v. Link Belt Co. The court emphasized the elective features and declared that because of them, neither jury trial nor freedom of contract was denied. With regard to the common law doctrines the court said: "To deprive an employer, under such circumstances, of the right to assert those defenses is not an exercise of the police power, but is merely a declaration by the legislature of the public policy of the state in that regard. The right of the legislature to abolish these defenses cannot be seriously questioned." *

The Massachusetts elective act was upheld in an advisory judicial opinion before passage. The argument was much the same as that used by the Illinois court. With regard to the common law defenses the Massachusetts court held that "the rules of law relating to contributory negligence and assumption of the

* Deibeikis v. Link-Belt Co. 104 N.E. 211.

risk and the effect of negligence by a fellow-servant were established by the courts, not by the Constitution, and the Legislature may do away with them altogether ... as in the exercise of powers intrusted to it by the Constitution it deems will be best for the 'good and welfare of this commonwealth.' " * Because of the elective features of the act it was further held that the law did not deny jury trial or freedom of contract.

The New Hampshire elective statute was upheld in the case of Wheeler v. Contoocook Mills. The court held the act within the police power and stated that the legislature had the power"to abolish entirely the defenses of contributory negligence, assumption of risk, and the fellow-servant rule." **

The Supreme Court of New Jersey also upheld the Compensation statute of that state in the case of Sexton v. Newark District Telegraph Co. After stating that the common law defenses were merely rules of conduct and could be changed at the will of the Legislature, unless prevented by constitutional limitations, they held that the elective act did not deny due process of law, jury trial or freedom of contract. With regard to these the court said: "If he does not (accept the provisions of the act) he certainly is

* In re Opinion of Justices 96 N.E. 308.

** Wheeler v. Contoocook Mills. 94 Atl. 265.

not deprived of property without due process of law. If he does, then he has given the consent which the prosecutor contends he must give in order to be bound by the provisions of the second section. ... This contention (deprivation of trial by jury) totally misconceives the proper construction and effect of the constitutional provision in question. The language, with respect to this mode of trial, is that it shall remain inviolate, not that it shall be unalterable. It is, therefore, a privilege which may be waived by either party, and not an absolute right which is not the subject of such a waiver. ... Really, the matter (with regard to freedom of contract) comes down to a question or presumption or burden of proof, which it is entirely within the control of the Legislature to regulate so long as the parties are left entirely free to make whatever contract they choose, as they are in this case." *

The constitutionality of the Ohio Compensation Law was passed upon in the case of State v. Creamer. The court said: "The statute in question provides for the creation of a State Liability Board of Awards, which shall establish a state insurance fund, from premiums paid by employers and employees in the manner provided in the act." ** The act applied only to businesses where

* Sexton v. Newark District Telegraph Co. 86 Att. 451.

** State v. Creamer. 85 Ohio State 349.

the employer had five or more operatives regularly, and the workers paid 10 % while the employers paid 90 %. Employers who accepted were relieved of the liability to respond in damages at common law, and employers who did not accept the act were deprived of the defenses of contributory negligence, fellow-servant rule, and assumption of risk. The act was attacked as beyond the police power, taking private property without due process of law, and depriving parties of jury trial and freedom of contract. The court upheld the act against all these contentions. With regard to the police power, it quotes favorably from Freund as follows:" "The term "police power" has never been circumscribed. It means at the same time a power and function of government, a system of rules, and an administrative organization and force.' And in section 3, after discussing its nature and aims, he says: 'It will reveal the police power not as a fixed quantity, but as the expression of social, economic, and political conditions. As long as these conditions vary, the police power must continue to be elastic; i.e., capable of development.' ... We think it clear that the objects and purposes as above set forth, which the legislature contemplated in the passage of the law in question, are sufficient to sustain the exercise of the police power" * In

* Ibid.

taking up the charge of taking private property without due process of law, the court discussed the Ives case, as follows: "The (New York) court held the law invalid as imposing the ordinary risks of a business on the employer. The court states one of the premises on which it proceeds as follows: 'When our constitutions were adopted it was the law of the land that no man who was without fault or negligence could be held liable in damages for injuries sustained by another.' But that rule was not of universal application. At common law one may sustain such relation to the inception of an undertaking that he will be held liable for negligence in the progress of the enterprise, even though he have no part or connection with the negligent act itself which caused the injury. ... As to the right to abolish the defense of assumption of risk, it is enough to say here that the great weight of authority is against the New York Court. ... 'Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances." *

The Washington statute was a compensation act with compulsory insurance -- a step in advance of most of the previously considered compensation laws. The Supreme Court of the State of

* Ibid.

Washington upheld this statute in the case of State v. Clausen as a valid exercise of the police power, and as not violating due process of law, jury trial, or freedom of contract. The court said: "The test of the validity of such a law is not found in the inquiry: Does it do the objectionable things? But is found rather in the inquiry: Is there no reasonable ground to believe that the public safety, health, or general welfare is promoted thereby? ... It is not meant here to be asserted that this (police) power is above the constitution, or that everything done under the police power is lawfully done. It is meant only to be asserted that a law which interferes with personal and property rights is valid only when it tends reasonably to correct some existing evil or promote some interest of the state, and is not in violation of any direct and positive mandate of the constitution. The clause of the constitution now under consideration (due process of law) was intended to prevent the arbitrary exercise of power, or undue, unjust, and capricious interference with personal rights; not to prevent those reasonable regulations that all must submit to as a condition of remaining a member of society." * The courts are beginning to take a more liberal attitude, for they realize that the

* State v. Clausen. 117 Pac. p. 110:6-7

employee and employer are not on an equal footing.

Another 1911 compensation act was questioned. It was a Wisconsin statute, elective as to all employments except those having less than four employees, but employers having more than four employees lost the common law defenses if they did not elect. The law was attacked as to classification; but the court held that there was substantial difference between the two clauses , and thus the constitution was not violated. The court further held that it was not necessary to make a distinction between dangerous and safe employments as a basis for abrogating common law defenses, and with regard to liability without fault, said, "Under the statutory system for dealing with personal injury, losses incident to the performance of the duties of an employer are regarded as mutual misfortunes to be charged up, as directly as practicable, to the cost of production. The right to have the employer regarded as the agency to make payment to the employee and absorb the same as an expense of the industry, regardless of whether the loss is attributable to any human fault, is a legislative creation, within the constitutional exercise of the police power to legislate for the public welfare." *

Four compensation laws were enacted in 1912. Arizona,

* Borgnis v. Falk Co. 133 N.W. 209

Michigan, and Rhode Island enacted acts and Maryland again tried her hand at workmen's compensation which was not questioned this time. The laws of the other three states were attacked and in every instance upheld.

The Arizona statute, a compulsory one as to certain ennumerated hazardous employments and elective as to others, was upheld in the case of Behringer v. Inspiration Consolidated Copper Co. The provision, though, giving the personal representative of an employee whose injuries were fatal the option of choosing between compensation and suit for damages was held beyond the power of the Legislature because the representative had only the right to sue in case the injured man had failed to make election before his death.*

The Michigan law was upheld in the case of Mackin v. Detroit Timkin, Axle Co. ** and the Rhode Island statute was upheld in the case of Sayles v. Foley. *** The arguments employed were much the same as those used in preceding cases.

The year 1913 was another fruitful one for compensation, as eight laws were enacted in the states of Connecticut, Iowa, Minnesota, Nebraska, Oregon, Texas, New York, and West Virginia.

* Behringer v. Inspiration Consolidated Copper Co. 149 Pac. 1065.

** Mackin v. Detroit Timkin Axle Co. 150 N.W. 49.

*** Sayles v. Foley, 96 Atl. 340

The laws of all these states except Connecticut and Nebraska were questioned before 1917. New York, after the defeat of her first act in the case of Ives v. South Buffalo Railway Co., amended her constitution and again enacted a compulsory law which was upheld in the case of Jensen v. Southern Pacific Co. The court said: "This subject should be viewed in the light of modern conditions, not those under which common-law doctrines were developed. With the change in industrial conditions, an opinion has gradually developed, which almost universally favors a more just and economical system of providing compensation for accidental injuries to employees as a substitute for wasteful and protracted damage suits, usually unjust in their results. ... Surely it is competent for the state in the promotion of the general welfare to require both employer and employee to yield something toward the establishment of a principle and plan of compensation for their mutual protection and advantage."* The New York Court has at last abandoned its rather conservative attitude, and swung into line with general public opinion.

The West Virginia statute was an elective one, and was upheld in the case of De Francesco v. Piney Mining Co. With regard

* Jensen v. Southern Pacific Co. 109 NE. 600.

to the abrogation of the common law defences, this court said, "The defences inhibited or barred are such as the legislature had a clear right to eliminate for reasons of public policy." *

The Oregon elective statute was upheld in the case of Evanhoff v. Industrial Commission of Oregon, mainly as an exercise of police power. The court in concluding its decision said: "Before its enactment one workman out of three received a large compensation for his injuries by an action at law, while the remaining two were defeated and got nothing. Now every workman accepting its provisions receives some compensation if injured; ... It has been a boon to the employers, the employed, and the community, which latter could formerly only offer to the injured laborer the charity of the almshouse instead of that just compensation which he may now receive without the humiliation of pauperism or the loss of self-respect." **

The Minnesota elective statute was sustained in the case of Matheson v. Minneapolis St. Ry. Co. The court said: "... and such choice is no less optional because section 2 (permitting election in absence of a written statement to the contrary) is presumed to have been accepted by all employers and employees."***

* De Francesco v. Piney Mining Co. 86 S.E. 777.

** Evanhoff v. State Industrial Commission. 154 Pac. 106.

*** Matheson v. Minneapolis St. Ry. Co. 148 N.W. 72.

The Iowa act was upheld in the case of Hunter v. Colfax Consolidated Coal Co.* and the Texas law in the case of Middleton v. Texas Power and Light Co. ** The decision followed much in the trend of previous opinions, especially the Illinois and New Jersey cases.

1914 saw the enactment of two statutes, one in Kentucky and the other in Louisiana. The Louisiana law was not questioned; but the Kentucky act was attacked in the case of Kentucky State Journal Co. v. Workmen's Compensation Board, and declared unconstitutional. The Kentucky constitution in section 54 provides that "The General Assembly shall have no power to limit the amount to be recovered for injuries resulting in death, or for injuries to person or property." The Compensation Act provided that a contract binding an employee to accept the provisions of the act should be "conclusively presumed to have been made on his continuing to work for the employer, posting notices that he had paid premiums provided for by the act." *** The court held that this part of the act did limit the amount recoverable and was thus in contravention to the section 54 of the state constitution. Section 241 of the constitution further gives the right to sue for

* Hunter v. Colfax Consolidated Coal Co. 154 N.W. 1037.

** Middleton v. Texas Power and Light Co. 185 S.W. 556.

*** Kentucky State Journal Co. v. Workman's Compensation Board. 170 S.W. 1166.

damages in the case of injuries causing death and the court held that a law to be valid must not thus restrict the rights of personal representatives. The law was declared unconstitutional mainly on technical grounds. In concluding its decision, the court said: "This court looks with great favor upon a workmen's compensation act that would deal justly with the employer and employee." *

Seven new states (Colorado, Indiana, Maine, Oklahoma, Pennsylvania, Vermont, and Wyoming) enacted compensation laws in 1915; and, in addition, Montana again passed a compensation act -- this time an elective one. Only the Oklahoma and Pennsylvania statutes were attacked, and the Pennsylvania statute was upheld in the case of Anderson v. Carneigie Steel Co. ** The act was elective and sustained on the same grounds as most of the other elective acts had been.

The California statute of 1911 which was decided upon in 1915 went farther than any preceding law. The act was of a comprehensive and compulsory character, providing that "liability for the compensation provided by this act, in lieu of any other

* Ibid.

** Anderson v. Carnegie Steel Co. 99 Atl. 215.

liability whatsoever, shall, without regard to negligence, exist against an employer for any personal injuries sustained by his employees by accident arising out of and in the course of employment and for the death of any such employee if the injury shall proximately cause death where the following conditions of compensation shall concur: (1) Where, at the time of the accident both the employer and the employee are subject to the compensation provisions of this act. (2) Where, at the time of the accident, the employee is performing service growing out of and incidental to his employment. ... (3) Where the injury is proximately caused by the accident, ... with or without negligence, and is not so caused by the intoxication or the wilful misconduct of the injured employee." * The act was upheld in the case of the Western Indemnity Co. v. Pillsbury, the court saying, "If such a law may be given force, the sanction for it must be found in that legislative authority usually termed the police power. ... The arbitrary taking of life, liberty, or property cannot, of course, be justified by referring the act to the police power. But, if a given piece of legislation may fairly be regarded as necessary or proper for the protection or furthering of a legitmate public

* California Statutes, 1911. p. 796. Section 12.

interest, the mere fact that it hampers private action in a matter which had heretofore been free from interference is not a sufficient ground for nullifying the act." * This view shows much progress in the direction of workmen's compensation, and it embodies as liberal a decision as has been handed down by a state court. This act was upheld after several elective laws had been upheld, and with regard to the compulsory feature, the court said, " ... the general line of reasoning (that elective compensation does not deprive the parties of jury trial or freedom of contract, and that the act is an exercise of the police power) would, if pursued to its logical results, go far toward sustaining even such an act." **

The Oklahoma law was also compulsory, and it was also upheld in the case ofAdams v. Iten Biscuit Company against the contentions that it did away with due process of law and jury trial, and said it was entirely proper for the legislature to abolish the common law defenses. The court quoted favorably in regard to these from other state courts which had upheld such acts, especially from the California court which also sustained a compulsory act. The court,after saying that the act was "in accordance with an enlightened modern public opinion," *** continued as follows:

* Western Indemnity Co. v. Pillsbury, 151 Pac. 398. (1915)

** Ibid.

*** Adams v. Iten Biscuit Company, 630 Okalhoma 52

"Instead of the losses being borne as heretofore, in a great majority of cases, by the injured employee or his dependent ones, it was the belief that such losses should be borne by the industries causing them. ... " * The act was upheld under the police power, the court saying, "The security of the state and the preservation of the peace and good order of society depends, in its final analysis, upon the power of the state to make and alter its laws in accordance with a sound public policy, and to prescribe regulations to promote the health, peace, morals, education and good order of the people, and every member of society obtains and holds all that he possesses through the aid and under the protection of the law and subject to the power mentioned, else the right of the community to prosper and advance and promote the public weal would be rendered subservient to the enjoyment of private rights." **

Such were the conditions in 1916 when the power of appeal from the State Supreme Court to the Federal Supreme Court was widened. Four states (Maryland, Montana, New York and Kentucky) had enacted laws which were declared unconstitutional; but in every instance these states enacted new laws which were either

* Ibid.

** Ibid.

upheld or not questioned. Twenty-nine other states (Arizona, California, Colorado, Connecticut, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Texas, Vermont, Washington, West Virginia, Wisconsin, and Wyoming) had enacted statutes which were either sustained or not attacked, thus making a total of thirty three states which had compensation statutes. Six of these states (Arizona, California, Maryland, New York, Ohio, and Oklahoma) had compulsory provisions.

The act widening appeal was passed in September, 1916, and part of it reads as follows: "It shall be competent for the Supreme Court, by certiorari or otherwise, to require that there shall be certified to it for review and determination with the same power, and authority and with like effect as if brought up writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a state in which a decision could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is in favor of their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is against their validity; or where any title, right, privilege, or immunity is claimed under the

the Constitution or any treaty or statute of, or commission held or authority exercised under the United States, and the decision is either in favor of or against the title, right, privilege, or immunity especially set up or claimed by either party, under such Constitution, treaty, statute, commission, or authority." *

As a result, appeals came to the Supreme Court. In the next year, three important cases -- New York Central Railway Company v. White, from the state of New York; Hawkins v. Bleakly from Iowa; Mountain Timber Company v. Washington -- came before the Supreme Court involving the validity of three different kinds of compensation acts, and in every instance the acts were upheld.

With regard to the New York statute, the court held that "the compulsory compensation scheme of the New York Compensation act, " ** abolishing the common law defences and in their place imposing a liability upon employers to make compensation for disabling or fatal accidental injuries received by employees "in the course of their employment in certain gainful occupations denominated 'hazardous employments' without regard to fault as a cause, except where the injury or death is occasioned by the employee's

* United States Statutes, C 448 239 Stat. 726.

** New York Central Ry. Co. v. White 243 U.S. 188.

wilful intention to produce it, or where the injury results solely from intoxication while on duty, ... does not contravene the United States Constitution, fourteenth Amendment as taking property without due process of law, or unwarrantably limiting freedom of contract, when considered from the standpoint of employer or employee, but is a valid exercise of the police power of the state."* The court further said: "And we recognize that the legislation under review does measurably limit the freedom of employer and employee to agree respecting the terms of employment, and that it cannot be supported except on the ground that it is a reasonable exercise of the police power of the state. In our opinion it is fairly supportable upon that ground. And for this reason: The subject matter in respect of which freedom of contract is restricted is the matter of compensation for human life or limb lost or disability incurred in the course of hazardous employment, and the public has a direct interest in this as affecting the common welfare. 'The whole is no greater than the sum of all the parts, and when the individual health, safety, and welfare are sacrificed or neglected, the state must suffer.' Holden v. Holden, 169 U.S. 366. ... Laws regulating the responsibility of employers for the injury or death of employees, arising out of the employ-

* Ibid.

ment, bear so close a relation to the protection of the lives and safety of those concerned that they properly may be regarded as coming within the category of police regulations." *

The next case which came up was the one questioning the validity of the Iowa elective compensation statute, ** and the Iowa act was naturally upheld after a reference to the New York Case.

The Washington act, however, presented a different problem, for in that state employers in the specified hazardous employments were compelled to pay workmen's compensation premiums to a state insurance fund. The statute was attacked as denying due process of law, the equal protection of the law, and beyond the police power. The act was sustained, nevertheless, but by only a five to four decision. In taking up this case, the court judged it, "proper to consider: (1) Whether the main object of the legislation is, or reasonably may be deemed to be, of general and public moment, rather than of private and particular interest, so as to furnish a just occasion for such interference with personal liberty and the right of acquiring property as necessarily must result from carrying it into effect. (2) Whether the charges imposed upon employers are reasonable in amount, or, on the other

* Ibid

** Hawkins v. Bleakly, 243 U.S. 210

hand, so burdensome as to be manifestly oppressive, and (3) whether the burden is fairly distributed, having regard to the causes that give rise to the need for the legislation. ... As to the first point: The authority of the states to enact such laws as reasonably are deemed to be necessary to promote the health, safety, and general welfare of their people carries with it a wide range of judgment and discretion as to what matters are of sufficiently general importance to be subjected to state regulation and administration. ... (The State) may require that these human losses shall be charged against the industry, either directly ... or by publicly administering the compensation and distributing the cost among the industries affected. ... Upon this (the second) point no particular contention is made that the compensation allowed is unduly large; and it is evident that, unless it be so, the corresponding burden upon the industry cannot be regarded as excessive if the state is at liberty to impose the entire burden upon the industry. ... Upon the third question -- the distribution of the burden -- there is no criticism of the act in its details."*

In the following year the Texas case was appealed to

* Mountain Timber Co. v. Washington. 243 U.S. 219.

the federal Supreme Court, and attacked as making an unfair classification, denying equal protection of the laws and due process of law. Employers having less than five employees, and certain other industries such as farming were excepted; but the court held that it was "not such an arbitrary classification as to deny the equal protection of the laws." * The other contentions were disposed of by a reference to the New York and Washington cases.

The next case, New York Central Railway Company v. Bianc, came up as the result of an amendment to the New York Act, which reads as follows: "In case of an injury resulting in serious facial or head disfigurement the Commission may in its discretion, make such award or compensation as it may deem proper and equitable, in view of the nature of the disfigurement, but not to exceed three thousand five hundred dollars." ** The Supreme Court, however, upheld the act, saying that "the 'due process of law' clause of the fourteenth Amendment does not require the states to base compulsory compensation solely upon loss of earning power." ***

Two other cases came up in 1919, both of them relating to admiralty and maritime jurisdiction. The Judicial Code of the

* Middleton v. Texas Light and Power Co. 249 U.S. 152

** New York Laws. 1916. Chap. 622. sec. 15.

*** New York Central Ry. Co. v. Bianc. 250 U.S. 596.

United States provided that the jurisdiction of the United States courts should be exclusive of "all civil cases of admiralty and maritime jurisdiction, saving to suitors, in all cases, where the common law remedy, where the common law is competent to give it."* This was amended on October 6, 1917 by adding the words, "and to claimants the rights and remedies under the Workmen's Compensation Law of any State." ** In the case of Peters v. Veasey, *** the Federsl Supreme Court reversed a judgment of the Louisiana Supreme Court which held that the amendment had retroactive effect. In the second case, Knickerbocker Ice Compant v. Stewart, the amendment itself, upon the groundof the exclusiveness of Federal jurisdiction,was declared unconstitutional as beyond the power of Congress "to legislate concerning rights and liabilities within the maritime jurisdiction." ****

Three other cases involving workmen's compensation have come up before the Supreme Court. In the first, Thorton v. Duffy, the court held that a "ruling of a state (Ohio) industrial commis-

* Judicial Code, Clause Third. 256.

** U. S. Statutes, Chap. 97, 40 Stat. at L. 395.

*** Peters v. Veasey 251 U.S. 121

**** Knickerbocker Ice Co. v. Stewart. 253 U.S. 149.

sion, justified or demanded by a change in the state law, by which the commissioner, revoking its previous discretionary action, declares that no employers shall be permitted to pay or furnish directly to injured employees or to the dependents of killed employees the compensation and benefits provided for in the state Workmen's Compensation Law if such employees, by contract or otherwise, shall provide for the insurance of the payment by them of such compensation and benefits, or shall indemnify themselves against loss sustained by the direct payment thereof, does not unconstitutionally impair the obligations of insurance contracts entered into upon the faith of the previous ruling of the commission, nor does such ruling amount to a denial of due process of law or of the equal protection of the laws." * The courted cited favorably from the New York and especially the Washington case, and added that "the law expressed the constitutional and legislative policy of the state to be that the compensation to workmen for injuries received in their employment was a matter of public concern, and should not be left to the individual employer or employee, or be dependent upon or influenced by the hazards of controversy or litigation, or unequality of conditions." **

* Thornton v. Duffy. 254 U.S. 361.

** Ibid.

In the next case, Tower Vein Coal Company v. Industrial Board of Indiana, the court held that a state might "consistently with the due process of law and equal protection of the laws clauses of the Federal Constitution, enact a general workmen's compensation law applicable to all employees, and make it compulsory as to one hazardous employment (coal mining) and elective as to all others, except railway employees engaged in train service, who are excluded." *

In the last, a minor case, it was held that the general admiralty jurisdiction extended to a "proceeding to recover damages resulting from a tort committed on a vessel in process of construction when lying on navigable waters within a state." **

These federal decisions together with the state supreme court decisions, have finally assured the constitutionality of workmen's compensation. Today the trend of legislation lies in the direction of "more adequate and certain relief, and the simplification of procedure to accomplish the desired end of prompt and equitable consideration of claims on account of industrial injuries." *** Besides this, ten additional states (Deleware, Idaho, Missouri, New Mexico, North Dakota, Georgia, South Dakota, Utah, Kansas, and Tennessee) have enacted

* Tower Vein Coal Co. v. Industrial Board of Indiana, 65 L. ed. 383.

** Grant Smith--Porter Ship Co. v. Rhode. 66 L. ed. 172.

*** Monthly Labor Review, April, 1921. p. 417.

compensation acts, thus making a total of forty-three states with such provisions.

In concluding, we may note that there is one underlying principle in the legislative action, based upon the fact that the employer and employee are no longer on an equal footing. The legislature has then attempted to place them upon a more equal plane, but the courts have been slower and more conservative in adopting this view. Part of this may be explained by a legal theory which held that law was based on certain principles of justice which were eternal and immutable. This led to the idea that legal right was an unchanging thing, and there was a "tendency in the legal mind to regard constitutions as unchanging. * Having set up certain rules, the courts were loathe to abandon them. In time, however, the pressure of a general public opinion and the actions of the legislatures, have forced the courts to give way. Modifications were made slowly, but inevitably. "Rights generally regarded as absolute are coming to be regarded after all as only relative." ** The courts have finally accepted the view that the workmen and employer are not equal, and have acted accordingly.

* Groat, Attitude of American Courts in Labor Cases, p. 360

** Ibid. p. 117.